

DOCUMENT RESUME

ED 229 804

CS 504 169

AUTHOR Virts, Paul H.
TITLE Changing Public Interest Values in Broadcast Deregulation.
PUB DATE 7 Nov 82
NOTE 32p.; Paper presented at the Annual Meeting of the Speech Communication Association (68th, Louisville, KY, November 4-7, 1982).
PUB TYPE Information Analyses (070) -- Speeches/Conference Papers (150)
EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Broadcast Industry; *Federal Regulation; *Models; Public Agencies; *Public Opinion; Public Policy; *Radio; *Standards
IDENTIFIERS *Deregulation; *Federal Communications Commission

ABSTRACT

Because the Federal Communication Commission's (FCC) decision to deregulate commercial radio has created great controversy over what constitutes "public interest" in broadcast deregulation, this paper provides a brief historical analysis of the bases for defining the public interest standard in broadcast regulation and examines the use of marketplace forces in defining the public interest in radio deregulation decisions. After the introduction of the problem, the first part of the paper traces the origin of the public interest standard and the arguments the regulators have used to rationalize their public interest determination. The paper then explains how the FCC has based its movement toward deregulation on the idea that marketplace forces, not government regulations, have come to dominate commercial radio. Major arguments against the FCC's view are then reported, and the ways in which the FCC has modified its reliance on the marketplace model are detailed. The paper concludes with a lengthy discussion of the entire controversy, pointing up weaknesses and inconsistencies in the FCC's use of the marketplace model. (JL)

* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☒ This document has been reproduced as
received from the person or organization
originating it.
☐ Minor changes have been made to improve
reproduction quality.

• Points of view or opinions stated in this docu-
ment do not necessarily represent official NIE
position or policy.

Changing Public Interest Values in Broadcast Deregulation

by Paul H. Virts

CBN University

Virginia Beach, Virginia 23463

"PERMISSION TO REPRODUCE THIS
MATERIAL HAS BEEN GRANTED BY

Paul H. Virts

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)."

Presented at
Mass Communication Division
Speech Communication Association Convention
Louisville, Kentucky

November 7, 1982

Changing Public Interest Values in Broadcast Deregulation

The Federal Communication Commission's (FCC) decision to de-regulate commercial radio has created greater controversy within the broadcasting industry than probably any other single rule-making. By the Commission's own count, it received 24,073 formal and informal comments and reply comments in this proceeding.¹ Less than 10% of the comments and reply comments favored deregulation, while nearly 82% opposed the proceeding.

The rule-making generated extensive debate on the four major deregulation proposals: removing processing guidelines for non-entertainment programming and the number of commercial minutes per hour and eliminating formal community ascertainment and program log requirements. One issue central to debate in each of the areas was whether the Commission's proposals were consistent with or contrary to the "public interest." The Commission, was rather sensitive to the charges that it was doing away with the "public interest" standard:

Numerous comments also contended that the Commission is attempting to replace the statutory "public interest" concept with the "marketplace" concept...It is not the public interest standard we propose to eliminate. That standard is contained in the Communication Act of 1934, as amended, and could not be changed by us even if we wanted to...Rather, since marketplace solutions can be consistent with public interest concerns, we sought to explore in this proceeding the question of whether or not in the context of radio the public interest can be met through the working of marketplace forces rather than by current Commission regulations. Again, that issue does not contemplate the elimination of the standard, only a debate over what the standard requires and what methods are best suited to meet that standard in the most efficient way and at the least cost to the public.²

The debate over what constitutes "public interest" in broadcast deregulation is the subject of this paper. This paper has two basic purposes:

- (1) To conduct a brief historical analysis of the bases for defining the

public interest standard in broadcast regulation, and (2) To analyze the use of marketplace forces in defining the public interest in the radio deregulation decisions. The second purpose leads to a number of important questions: What are meant by marketplace forces? What evidence is there of the effectiveness of marketplace forces in regulating broadcasting? In what areas can the market regulate itself? What are the major problems with marketplace self-regulations? These will be explored in this paper.

Origins of Public Interest Standard

The idea that radio is a public trust first surfaced at the Third Radio Conference called by Secretary of Commerce Herbert Hoover in 1924.³ Until then, radio was considered a private enterprise. Mr. Hoover elaborated on the public interest concept at the Fourth Radio Conference the following year:

The other is a public medium, and its use must be for public benefit. The use of a radio channel is justified only if there is public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution...⁴

This change in emphasis came about because of two problems experienced in radio broadcasting in the early 1920s. An increasing number of radio stations were going on the air, and the resulting interference led to the deterioration of radio service. Also, there was increasingly monopolization of radio frequencies by a few broadcasters.

By the time the Congress began seriously debating a bill to regulate radio in 1926, Hoover recommended that the government regulate radio as a "public interest to the same extent and upon the basis of the same general principles as our public utilities." Congress did not require the radio industry to be restructured as a public utility, but it did borrow a phrase from public utility regulation as a foundation for all regulation. The Radio Act of 1927 stipulated that the Federal Radio Commission (FRC) was to regulate in the "public convenience, interest, and necessity."

In an early report of its activities, the FRC acknowledged, "No attempt is made anywhere in the act to define the term 'public interest, convenience, or necessity,' nor is an illustration given of its proper application."⁶

The reaction to the vague standard was predictable:

The Commission has been urged to give a precise definition of the phrase "public interest, convenience, or necessity," and in the course of the (license renewal) hearings has been frequently criticized for not having done so. It has been urged that the statute itself is unconstitutional because of the alleged uncertainty and indefiniteness of the phrase.⁷

But the Commission went on to defend the wording of the standard:

So far as the generality of the phrase is concerned, it is no less certain or definite than other phrases which have found their way into Federal statutes and which have been upheld by the Supreme Court of the United States...To be able to arrive at a precise definition of such a phrase which will foresee all eventualities is manifestly impossible...It must be remembered that the standard provided by the act applies not only to broadcasting stations but to each type of radio station...Any definition must be broad enough to include all these yet must be elastic enough to permit the definite application to each,⁸

Shortly after the FRC began its task of regulating in the "public convenience, interest, and necessity," the Supreme Court acknowledged the validity of the standard. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power...The requirement is to be interpreted by its context, by the nature of transmission and reception, by the scope, character and quality of services."⁹ Furthermore, the court ruled that the standard "is as concrete as the complicated factor for judgment in such a field of delegated authority permit."¹⁰

Rationalizing Public Interest Determinations

Frederick Ford, former member of the Federal Communications Commission (FCC) related the conclusion of an attorney who "stated that the public interest, convenience or necessity is 'simply what the Commissioners say it

is at the time they render a decision.' "¹¹ One might infer from that statement that the Commission makes arbitrary and capricious decisions. A second interpretation might be that the public interest standard is an ever-changing standard. In their recent study on FCC decision makers' definitions of public interest, Krugman and Reid conclude that the change is a central characteristic of the public interest standard:

Respondents indicated that the rules were constantly changing and evolving because of changes in interest, technology, society and the economy. To a large degree dynamism was fostered by the inherent uncertainty of the situation. The policy process was seen as fluid rather than stagnant.¹²

The FRC and FCC have used a number of arguments to rationalize their public interest determinations. These were necessary because of the vagueness of the public interest standard. These rationalizations include:

Law of physics. In defining the public interest in the early days of broadcast regulation, the FRC turned to what it considered an immutable law of physics--there is a limited amount of the electro-magnetic spectrum available for broadcasting and its use must be carefully coordinated to prevent interference which would render the service ineffective. This argument became known as the scarcity doctrine.

In a 1928 statement defining the public interest, the FRC said the fact of scarcity led the Commission to set aside "a substantial band of frequencies...for the exclusive use of radio broadcasting and the radio listening public."¹³ and to provide "the best possible broadcasting reception conditions throughout the United States."¹⁴

Marketplace forces. Though it was not labelled as such, an evaluation of the effectiveness of marketplace forces was conducted by the Congress and the FRC. This evaluation led to the conclusion that because radio frequencies were largely monopolized by the Radio Trust¹⁵ the government would have to

intervene. In terms of economic theory, the lack of competition led to marketplace failure. An evaluation of marketplace forces was used, then, in defining the public interest.

In the 1928 statement, the FRC said the public interest required licensees to refrain from broadcasting private matters but to program for the benefit of the entire community and to broadcast following advertised schedules, and required the Commission to provide a fair distribution of services to avoid duplication of services, and to make sure only trustworthy citizens were granted licenses.¹⁶ The Commission went on to discuss how the public interest standard would be applied:

In conclusion, the commission desires to point out that the test "public interest, convenience, or necessity"--becomes a matter of a comparative and not an absolute standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, or necessity of the individual broadcaster or the advertiser.¹⁷

The FRC re-affirmed this basic formulation of the public interest standard in the Great Lakes decision, adding what it considered to be its own responsibilities and those of licensees in determining the public interest.

In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views...The entire listening public within the service areas of a station...is entitled to service from that station...the tastes, needs, and desires of all substantial groups among the listening public should be met, by a well-rounded program...With so few channels in the spectrum which can appropriately be placed on any portion of the program...The commission does not propose to erect a rigid schedule specifying the hours or minutes that may be devoted to one kind of program or another. What it wishes to emphasize is the general character which it believes must be conformed to by a station in order to best serve the public.¹⁸

The FCC later made decisions which were upheld by the courts based on the operation of marketplace forces. For example, in the Sanders Brothers case, the Supreme Court acknowledged,

Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.¹⁹

The FCC was permitted to allow marketplace forces, rather than government protectionism, to keep stations on the air. Much later in its Policy on Changes in Entertainment Formats, the FCC expressed stronger support than ever before for marketplace forces -- "The evidence on this record supports the conclusion that the marketplace is the best way to allocate entertainment formats in radio."²⁰ The Commission cited as evidence the fact that the marketplace has produced a wide-range of entertainment formats and increasing specialization within each format type and questioned whether government entertainment format guidelines could be as responsive to listeners' tastes as marketplace forces could. The Supreme Court upheld the Commission's policy.²¹

One outgrowth of the Commission's marketplace analysis and its perception of the failure of the marketplace to serve the public has been its regulations requiring licensees to respond to needs in their communities. Because it is prohibited by law from prescribing program content (censorship), the Commission has devised procedures for community ascertainment and general guidelines for fairness in dealing with controversial issues.²² Rather than dictate what the public interest mandates in every community, the Commission gave licensees guidelines to follow in determining what the public interest standard requires.

In summary, consideration of marketplace forces dates back to the earliest days of broadcast regulation. Marketplace analysis indicated that

marketplace forces were not working because of lack of competition and because of technical problems (interference). However, the FCC has always encouraged competition among stations and in recent years has found that the marketplace can regulate itself in some areas.

Federal Constitution. The FCC and the courts have also turned to the First Amendment of the Constitution for help in rationalizing the public interest determinations. Congress initially introduced First Amendment considerations into broadcast regulation by stipulating in both the Radio Act of 1927 and the Communications Act of 1934 that the government could not censor broadcast stations, that is, the government could not abridge the First Amendment rights of broadcasters. The Supreme Court ruled in both the Shuler²³ and the Network²⁴ cases that licensing radio stations did not violate broadcasters First Amendment rights. Interestingly, it wasn't until much later that the FCC stated how it would consider a licensee's programming proposals without denying their rights to freedom of speech:

Although the Commission must determine whether the total program service of broadcaster is reasonably responsible to the interests and needs of the public they serve, it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program.²⁵

Later, the emphasis on the First Amendment rights of broadcasters shifted to the First Amendment rights of listeners. In its 1949 policy statement on broadcast editorializing, The FCC said that regulating broadcasting in the public interest meant maintaining

...radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole...It would be inconsistent...that...persons who are granted limited rights to be licensees of radio stations...may themselves make radio unavailable as a medium of free speech...Congress intended that radio stations should not be used for private interest, whims, or caprices of the particular persons who have been granted licenses, but in manner which will serve the community generally...²⁶

The attempt to guarantee freedom of speech for both broadcasters and their audience members led to a classic conflict which the Supreme Court

had to resolve. In its Red Lion decision, the court stated,

A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community...Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners not the right of the broadcasters, which is paramount.²⁷

In short, when broadcaster's and listener's rights are in conflict, the listeners are to be given priority.

Federal Statutes. The Commission and the courts have also used federal statutes in rationalizing their public interest determinations. These laws passed to protect public welfare, are by definition part of the public interest.

Several of these laws are stated as prohibitions against certain types of programming material. Congress has outlawed broadcasting lottery information and obscene language²⁹ or committing fraud over the airwaves.³⁰ The prohibition against obscene language was originally included in Section 29 of the Radio Act of 1927 and Section 326 of the Communications Act of 1934, but became a part of the criminal code in 1948. The prohibition against broadcasting lottery information was originally part of Section 316 of the Communications Act of 1934 but was separately codified in 1948. Another federal statute which the FCC has applied to broadcasting is the equal employment opportunity provisions of the Civil Rights Acts of 1964, which prohibits discrimination by employers engaged in interstate commerce.³¹

The FCC and the Courts have also turned to the provisions of the Radio Act of 1927 and to the Communications Act of 1934 in determining

the public interest. For example, the Supreme Court supported the FCC in applying Fairness Doctrine provisions of Section 315 of the Communications Act of 1934, as amended.³²

Democratic Values. The Federal Communications Commission has also turned general values of a democratic society for help in determining what the public interest is. The central democratic ideal which the Commission has sought to uphold through broadcasting is "an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day."³³ This informed public, in turn, ideally makes better decisions regarding how the society should be operated. The FCC reminded licensees,

It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.³⁴

As this brief overview indicates, the FCC and the courts have used a number of rationalizations in defining the public interest. In the early period of broadcast regulation, the FRC and the FCC based policies and decisions on the scarcity doctrine and on their evaluation of marketplace failure. The commissions paid very little attention to constitutional implications of regulations, though the courts addressed these implications in both the Shuler and the Network cases. However, the court's most thorough treatment of constitutional issues arose in the Red Lion case. As one might expect, the FCC later in its history turned to federal statutes, especially its own enabling legislation (the Communications Act of 1934), and the precedents based on these statutes. The FCC and courts have given only scant attention to democratic values. In most recent years, both the FCC and the Supreme Court have signalled a return to marketplace considerations in policy making. We now turn to a discussion of this trend within the

framework of the decision to partially deregulate commercial radio.

Marketplace Concept in Radio Deregulation

A quick reading of the Notice of Inquiry and Notice of Proposed Rule-Making on Deregulation of Radio³⁵ (hereafter referred to as the Notice) and the Report and Order on Deregulation of Radio³⁶ (hereafter referred to as the Report) indicates that the FCC has relied heavily on a marketplace analysis and has decided to allow some of the self-regulating mechanisms of the marketplace replace government regulation. Both the FCC and commenters frequently referred to federal statutes, especially the Communications Act and the Fairness Doctrine,³⁷ and First Amendment consideration³⁸ in the rule-making. But both the FCC and those responding to the deregulation proposals devoted most of their attention to marketplace considerations.

In September 1979, the FCC issued the Notice proposing a wide-range of options in deregulating commercial radio in four areas: non-entertainment programming guidelines, commercial limitations, ascertainment obligations and specific guidelines, and program logging requirements. After allowing for substantial public comments, holding public hearings around the country, and convening special panel discussions including groups representing interested parties, the FCC issued the Report in February 1981. Despite court challenges³⁹ and petitions for reconsideration,⁴⁰ the regulations went into effect in April 1981.

The centerpiece of both the Notice and the Report was the FCC's argument that marketplace forces, rather than government policies, were regulating some practices in the commercial radio industry, thus, the Commission could remove some of these unnecessary regulations. This argument was based on an economic theory of marketplace forces. According to the theory, public services should correspond to what the public wants

at a cost low enough to encourage public consumption yet high enough to allow the producer to make a profit and stay in business. Some public services are more highly demanded than other. Furthermore, given the diversity of the American public, there is a need for a variety of services.

Economic theory hypothesizes that as competition among producers of public services increases, producers will become more responsive to public wants to attract as large an audience as possible and to make as much profit as possible. In smaller, more homogeneous markets, broadcasters will reach a broad audience; however, in larger, more heterogeneous markets, broadcasters and advertisers will seek narrower, more well-defined audiences. Regardless of market size, producers have incentives to give the public what it wants.

The assumptions of the economic model contradict those of traditional government regulation of broadcasting, which include: 1) There is limited spectrum space, thus, there is a limit to the number of competitors who can provide radio service; 2) Without government regulation, broadcasters will serve their private interests (primarily making profit) rather than the public interest (providing entertainment and non-entertainment programming for all segments of the community); and 3) Without government regulations, broadcasters will have insufficient incentives to determine public needs. The FCC launched the rule-making to determine whether competitive marketplace forces would provide sufficient incentives to balance private interests with the public interest by restricting the amount of commercialization, by providing sufficient non-entertainment programming, and by motivating broadcasters to find out about public needs. It was also interested in re-examining the assumption of limited competition and the need for program logging.

The FCC presented extensive data in the Notice to support its contention that marketplace force provide adequate self-regulation in some areas. Key findings include:⁴¹

1. The number of radio stations has increased dramatically (from 583 in 1934 to 8,654 in 1979) since regulation began.
2. Television has replaced radio as the major medium for entertainment and information.
3. The increase in radio stations has led to specialization. Each station appeals to the tastes of slightly different audiences. Some stations provide specialized information programming, while others specialize in informational programming. Public stations, in particular, provide larger amounts of information programming.
4. A substantial portion of radio audiences want to hear news on the radio.
5. The vast majority of radio stations air more than the minimum amount of non-entertainment news and public affairs programming required by the FCC's staff processing guidelines.
6. News is most likely to be aired during high listenership times, while public affairs programs are more likely to be aired when listenership is lower.
7. Minority ownership of and/or employment at radio stations, a "structural" means of increasing program diversity, has been increasing at an acceptable rate.
8. Few stations in large or small markets (slightly more in medium sized markets) meet or exceed the FCC's staff processing guideline of 18 minutes of commercials per hour.

Based on radio station performance in the light of economic theory of the marketplace, the FCC proposed to: 1) "...remove itself from all consideration of the amount of non-entertainment programming...the marketplace would generally determine what levels of such programming would be presented,"⁴² though licensees would still have to abide by the Fairness Doctrine which mandates well-rounded handling of controversial issues, 2) eliminate "both the formal procedure and the ascertainment obligations itself,"⁴³ 3) "eliminate all rules and policies dealing with commercialization would be tolerated,"⁴⁴ and 4) eliminate "program log requirements for broadcast radio stations."⁴⁵

It should be noted that the Commission proposed eliminating processing guidelines for non-entertainment programming and commercials, and procedures for community ascertainment and program logging. Only in the area of community ascertainment did the FCC propose eliminating the general obligation to determine community needs. The wording of the proposal regarding commercialism was also open to divergent interpretations -- "eliminate all rules and policies dealing with commercial time." The Commission did not propose eliminating the general obligation to provide non-entertainment programming. The Commission warned that the adoption of these proposals "...would not completely remove the Commission from broadcast regulation in the areas of ascertainment, non-entertainment programming, and commercial matter. We would still consider petitions to deny complaints and other information to guard against marketplace failures."⁴⁶

The Commission concluded the Notice with these words:

...Market forces will, in most instances, yield programming that serves consumer well-being, and that whenever possible the Commission should allow consumer choices rather than regulatory decision-making to be the determinant of the public interest... The radio deregulation we are proposing today is part of an overall scheme that has as its hub a shift in our regulatory approach based on structural means of achieving diversity rather than on emphasizing conduct, fraught with all the dangers and inefficiencies of such a system.⁴⁷

Reaction to Marketplace Concept

The reactions to the FCC's Notice on commercial radio deregulation were predictable. The broadcasting industry hailed the efficiency of marketplace forces in giving audiences what they want and need. For the most part, the executive branch of the Federal Government supported the Commission's proposals. Public interest and church groups generally vociferously opposed allowing the marketplace to determine public interest. The large number and variety of comments makes it impossible to consider even a portion of them here. However, it will be useful to discuss some of the arguments

regarding the use of marketplace forces to define public interest. Several arguments were used repeatedly to support or to oppose deregulation; however, only opposing arguments are discussed here because supporting arguments generally followed FCC arguments discussed earlier.

One argument opposing deregulation is that radio is a unique resource. That is, its principal use is sharing information, it must be used following acceptable standards, it is not depletable and self-renewing, rights to use the spectrum cannot be transferred to users, and the use of radio gives political power and hence must be controlled by the government.⁴⁸ Another argument for restricting the use of radio is its scarcity. The FCC admitted that there might be scarcity in the radio spectrum, although it is not as scarce as it was once thought to be. Even if radio is unique and spectrum space is scarce the FCC argued, forces will lead broadcasting to ascertain public wants and needs and be responsive to them without government guidelines and procedures.⁴⁹

Another argument against deregulation points out that broadcasting is supported by advertisers, not directly by consumers hence the general economic theory is not applicable.⁵⁰ However, the FCC argued that broadcasters have the incentive to program what audiences want because the cost of producing unwanted programming is too high and because they want to maximize audience size. On the other hand, listeners have the option of listening to whatever programming satisfies them or of not listening at all.⁵¹ These incentives, then, lead broadcasters to program with audiences in mind, even though it is advertisers who directly support the medium.

Probably an even more pervasive argument is that consumer satisfaction cannot be equated with public interest. Some have argued that consumer satisfaction may measure "wants" but not necessarily needs.⁵² For example, in order to make informed choices at the ballot box, citizens need information

about candidates and issues, though they might not want and seek such information. Thus, listeners should be given what they need as well as what they want. Thus, consumer wants do not reflect some of the non-material social benefits to society--for example, an informed electorate -- of adequate ascertainment and non-entertainment programming. However, the FCC argued that its judgment of what the audience needs should not be substituted for the public's judgment, except when the existence of unmet needs has been clearly demonstrated.⁵³ Furthermore, the Commission pointed out that listeners may get information they need from sources other than radio.⁵⁴

A fourth argument used against deregulation is that marketplace forces provide few incentives to ascertain the needs of and to provide service for economically disadvantaged groups in society.⁵⁵ That is, groups with less purchasing power would be ignored in favor of more economically attractive groups. The FCC cites its equal employment regulations and minority ownership regulations as structural, rather than content, means of encouraging service to minorities.⁵⁶ The Commission also presented data that indicated that minorities, especially blacks, are attractive audiences for broadcasters and advertisers.⁵⁷ Furthermore, the FCC added, commenters failed to show in what ways the informational needs of minority groups were different from those of society in general.⁵⁸

A fifth argument used against relying on marketplace forces to determine public interest was that such an approach might require marketwide analysis to assess marketplace failure in non-entertainment programming. Many commenters saw marketwide analysis as unforceable because the FCC licenses individual stations and not entire markets.⁵⁹ The FCC agreed, arguing that marketwide analysis would place an unbearable heavy administrative burden on the Commission.⁶⁰

Effectiveness of Marketplace Forces

Judging from the FCC's Notice and much of the public's reaction to it one might assume that the FCC accepted with few if any reservations the notion that marketplace forces could adequately determine public interest. Such a conclusion is only partly accurate. In fact, the Commission expressed only partial reliance on marketplace forces. There were several evidences of this reluctance.

The final actions which the Commission took belie a reluctance to rely totally on marketplace forces. The Commission did remove its staff processing guideline for non-entertainment programming, but it retained the general obligation to provide non-entertainment programming. The Notice summarized the statutes regulations and decisions that demonstrated the commitment of the Congress, the Commission, and the courts to informing the public about important issues through the use of radio.⁶¹ The radio deregulation decision cast doubt on the need for specific non-entertainment guidelines but not on the overall need for such programming. In the Notice the Commission actually proposed doing away with both the general obligation as well as the detailed procedures for community ascertainment but in the end voted to retain the general obligation. The FCC decided to retain the general obligation because of its long-standing expectation that licensees should determine the needs of their communities, an obligation that was formalized in the 1960 Programming Statement, the constitutionality of which was upheld by the courts.⁶² However, stations can use any "reasonable means" of ascertaining community issues. In a related action, the Commission removed its program logging requirements, substituting the requirement that stations keep in their public files a list of five to ten issues. Again, the FCC relaxed some of the detailed procedures but did not totally remove a general obligation. Finally, the Commission eliminated all staff processing

guidelines for commercial loads, but it did retain general oversight over commercialism on radio, including the possibility of re-opening an inquiry into commercial loads if marketplace forces failed to check excesses.⁶³ In summary, then, the Commission recognized that the marketplace can regulate some aspects of radio broadcasting but not others.

The FCC also recognized the weakness of relying totally on marketplace forces to determine the public interest by leaving intact its structural regulations. It stated repeatedly throughout the Notice and the Report that two types of regulations -- program and structural -- could be imposed to make sure stations were serving the public interest, and structural regulation was preferable whenever possible.⁶⁴ For example, many people who commented on the deregulation proposals feared that marketplace forces, geared as they are to the profit motive, would fail to ascertain the needs of and provide programming for economically unattractive segments of the community. The FCC countered that it provides service for such groups by implementing its equal employment opportunity and minority ownership rules and by encouraging time-sharing and time brokerage for stations that cater to minority interests.⁶⁵

A third evidence of the Commission's less-than-total commitment to reliance on marketplace forces appeared in its direct admissions that the marketplace is an imperfect mechanism. Yet the Commission contended that marketplace self-regulation was better than the alternative -- the federal government's detailed regulation:

We recognize that the marketplace approach cannot assure that every demand for minority taste programming is met. Neither could a regulatory regime with programming guidelines and formal ascertainment procedures provide that assurance. Indeed, it is not in the public interest to allocate scarce resources to meet very minute demands where the public benefits are small, but the costs-- in terms of foregone alternative programming--are substantial. The primary advantage of the marketplace over administrative decision making is that the former provides an efficient and flexible mechanism for measuring these tradeoffs, while the latter is necessarily cumbersome and inflexible.⁶⁶

In other words, given two imperfect regulatory mechanism -- the government and marketplace forces -- the best course is to allow the marketplace to regulate itself as much as possible. Later in the Report, the FCC dealt with the charge that listener preferences cannot be substituted for the public interest:

...the history of radio regulation has been that it should be regulated to achieve the "public interest." That phrase has variously been defined as requiring, "the greatest good to the greatest number", "the fullest and most effective use" of the airwaves, or "the best practicable service to the public." None of these equate the public interest with a perfect correlation between service and listener preference. Rather, they all recognize that the Commission's obligation is to assure the ⁶⁷ best practicable service, not perfect service, to the listeners.

The Commission wrote that it would intervene in the market "when there is strong prima facie evidence that the imperfection is so great as to constitute a breakdown of the market."⁶⁸

Radio deregulation was most seriously challenged because of its provisions regarding non-entertainment programming, and it was in this area that the Commission spelled out most clearly the limitations of the market approach. In order to assess the failure or success of the market approach, it would be necessary to conduct extensive market-wide analysis. The Commission concluded:

...a strict market approach to non-entertainment programming is unworkable at the present time. Such an approach would be both administratively inconvenient and could be construed as contrary to the Act which mandates an approach, we will, ...take into account market forces by permitting each licensee to assess the other stations in the market its own determination as to what issues it will address in its own programming. However, each station will retain the obligation to present some programming relevant to issues facing the community, or...to its listenership.⁶⁹

Discussion

The FCC and the courts have turned to a number of sources for help in defining what the public interest is -- a seemingly immutable law of physics, the Constitution, federal statutes, democratic values, and market-

place forces. Though the Commission's earliest analyses and regulations were based on marketplace failures, the nature of marketplaces forces was never clearly spelled out until the radio deregulation decision. Of course in the early days of radio when monopolies existed, there was more concern because marketplace forces were not allowed to operate. Attention was drawn not to how they operate but to the fact that they were not allowed to operate. In the radio deregulation rule-making, the Commission returned to the marketplace concept but with a different result -- loosening rather than tightening regulation.

Most of the key arguments favoring and opposing marketplace regulation were raised in this proceeding, and many of these have been summarized in this paper. However, several important observations still need to be made.

First, though the Commission argued rather convincingly for allowing marketplace forces to operate, it did gloss over some interesting discrepancies. Neither the Commission nor the vast number of commenters demonstrated that marketplace forces will lead to either more or less effective ascertainment of community needs/issues. Arguments were easily side-tracked onto the costly and onerous nature of the ascertainment procedures. The Commission said it assumed any failure would be corrected through its structural regulation. One is left wondering how effective marketplace incentives are at encouraging ascertainment of community needs.

The efficacy of marketplace forces in determining the overall amount of non-entertainment programming is well-demonstrated especially when one considers the fact that the amounts presented in the Notice did not include the "Other" category (educational, sports, agricultural, religious, etc.) which the FCC includes under non-entertainment programming. By calculating the amounts of news and public affairs programming only, the FCC actually underestimated the amounts of non-entertainment programming.

However, these overall favorable statistics on radio station performance in non-entertainment programming can be somewhat misleading. It is clear from both the Notice and the Report that marketplace forces are encouraging substantial amounts and favorable placement of news.⁷⁰ However, a different picture emerges when examining public affairs programming. The Commission concluded that the amount of public affairs programming decreases with market size, but the trend is not terribly clear.⁷¹ Also, most public affairs programming is aired on weekends when audiences are smaller, which led the Commission to conclude, "It seems quite likely that, absent Commission regulations, many stations might not provide as much public affairs programming."⁷² The National Association of Broadcasters presented a study which, in the words of the Commission, indicates

...public affairs programming is produced in substantial quantities in all market classes and for both AM and FM stations. The quantity of public affairs programming ranges from an average of 3.4% of all programming in the largest AM markets to 2.8% in the smallest, while for FM the range is from 2.4% in the largest market classes to 1.8% in the smallest market class.⁷³

The problem with assessing the adequacies of the levels of public affairs programming data presented by either the FCC or the NAB is that the FCC requires no specific levels of public affairs programming. As a matter of fact, it does not require stations to air any public affairs, only minimum amounts of non-entertainment programming. However, it is in public affairs programming that stations often deal with issues of importance to the community. The FCC counters that licensees must still abide by the Fairness Doctrine provisions of Section 315 of the Communication Act of 1934. The fact still remains that the Commission failed to prove very conclusively that marketplace forces encourage sufficient amounts and favorable placement of public affairs programming.

A second observation about the FCC's use of marketplace self-regulation is that the Commission, contrary to its own stated principles, relied almost totally on quantitative analysis of marketplace performance in making the decision to deregulate commercial radio. In the Report, the Commission noted that it has consistently refused to "adopt numerical standards that it would use in the comparative context as an indicator of substantial service...merely increasing the amount of programming did not necessarily improve the service or give any significantly greater certainty as to what constituted superior service."⁷⁴ In other words, quantity is no guarantee of quality. Yet the Commission's decision rests largely on a quantitative base. No attempt was made by the Commission to determine whether communities were being served well by radio stations. For example, no data are provided regarding how much of the news programming in markets is duplicated among stations, thus there might be much less diversity of programming than the quantitative analysis indicates. The Commission alluded to this problem briefly in the Notice but failed to address it in depth in the Report.

...it is not obvious that those stations that prefer not to provide news and public affairs programming do more than a perfunctory job of providing such programming -- "rip-and-read" news and graveyard scheduling of public affairs programming, for example. Thus, the promise of an additional voice might not be very meaningful. It is also not clear that those stations that are not interested in news and public affairs programming would be offering different points of view. They may depend largely on news services that are already used by other stations.⁷⁵

To study the extent to which radio stations are meeting community needs is a difficult yet necessary task in assessing how well stations are fulfilling their commitments. Increasing the quantity of non-entertainment programming increases the likelihood, but fails to assure completely, that the community will be served by the programming.

A third observation is that the FCC said it preferred to make structural

rather than program regulations. It noted increases in the number of stations providing programming for minority groups⁷⁶ and in the numbers of minorities employed in broadcasting.⁷⁷ Again, no data are presented which demonstrate that service to minority groups has improved in light of these developments.

Fourth, possibly the most troublesome aspects of the radio deregulation decision are the problems associated with assessing and correcting marketplace failures. The Commission says the public has two avenues for informing the Commission of marketplace failures: Filing complaints and petitions to deny license renewal.⁷⁸ Procedures for both approaches are currently in effect in Commission regulations. In the Report, the FCC acknowledged the magnitude of the burden on member of the public to prove a marketplace failure:

Thus, a petitioner would have to have made out a showing of market failure before the Commission would intervene...the analytical and administrative burdens and costs that this method would place upon petitioners, licensees and the Commission would be enormous.⁷⁹

Instead, the petitioner can simply file either a complaint or a petition to deny against individual stations, which can

...respond by pointing not only to its own programming that may have addressed such issues, but also to other radio services available in the community that could reasonably have been relied upon to address such issues. It will not have to demonstrate that the programming was available in the community in an amount proportional to the complaining group's representation in the community.⁸⁰

Thus, licensees must bear the burden of proof that programming is provided to satisfy the complaint or petition. They cannot simply report that an all-news or public affairs station exists in the market and that such a station likely deals with the need.⁸¹ They must demonstrate that the need is being served by at least one station. Licensees will also have to examine the performance of other stations, a task which may be difficult if not

impossible given the removal of program log-keeping requirements and the complexity of determining how other stations' programming dealt with the need. Furthermore, stations would have to demonstrate that the need had arisen recently enough that the market could not reasonably be expected to respond.⁸² All of this increases, rather than decreases, the administrative burden on licensees.

Even greater difficulties arise when considering the FCC's proposals for correcting marketplace failure. The Commission laid out the following course of action:

The focus of our inquiry in the case of a challenge to license renewal will be whether the challenged licensees acted reasonably in choosing which issues to address. Licensees directing their non-entertainment programming to a narrow audience may defend their decision by demonstrating the presence of other stations in the community that reasonably were relied upon to address pertinent issues to other segments of the community, the station will be permitted to be more narrowly focused...the Commission will have to undertake an ad hoc review which considers the circumstances in which the decision was made.⁸³

This statement was followed by a totally bewildering example:

...a station in a market with a minority oriented station may be responsible in not treating issues of particular relevance to the minority community...If that minority oriented station had, for instance, consistently not presented such programming, the licensee's judgment may not have been reasonable. Minority issues may have been ignored long enough for the Commission to determine that the licensee knew or reasonably should have known this and should have taken steps to correct it.⁸⁴

The Commission, then, will attempt to determine whether the licensee has made a reasonable effort in choosing issues to cover in non-entertainment programming. The licensee is responsible not only for knowing about community needs but also for knowing what other stations are doing, even if some of those stations are programming for minorities but are not meeting the needs of these minorities and even if the challenged licensee is programming for a totally different audience segment. One would expect the Commission to require the minority stations to meet the needs of their specialized audiences. Not so. The station whose license has been

challenged bears the brunt of other stations' failure. Furthermore, licensees will have to demonstrate the reasonableness of their selection of issues and programming. Nowhere does the Notice mention that the Commission will require the station to carry programming on the issue that has been ignored, but that is what is implied.

One of two things will happen as a result of the filing of the petition to deny: 1) The Commission will determine that the challenged licensee has acted in good faith in determining needs to deal with and will grant renewal, leaving open the possibility that the need will go unmet or that the Commission will pressure another station to meet the need; or 2) The Commission will rule that the challenged licensee has not acted reasonably and will pressure him into dealing with the issue, a move that would constitute a violation of the licensee's First Amendment rights. In the end, the dream of deregulation could turn into a nightmare for the challenged licensee.

An equally frightening scenario can be constructed for those filing complaints or petitions to deny. The first problem is deciding which station in the market to file the complaint or petition against when a minority group in the community is not being served. The petitioner will have to monitor a particular station in depth before filing the complaint, that is, unless the petitioner wishes to randomly file complaints and petitions and risk losing credibility. The petitioner will also need to know what other stations are doing in the market in order to evaluate the challenged licensee's response to the complaint or petition. Few petitioners are willing to accept at face value a licensee's evaluation. The licensee may contend that the issue has risen so recently that the market could not be expected to respond, in which the case they need may go unmet. Finally, the FCC may rule that the licensee acted reasonably without requiring that the provide programming to meet the need. From the petitioner's perspective, the FCC may have

given the licensee so many loopholes as to make it virtually impossible to file successfully a complaint or a petition to deny.

It should be clear from this discussion that the FCC's solution to marketplace failure -- individual station accountability within the framework of market-wide performance -- is not an acceptable solution to either licensees or petitioners. The Commission wants to have its cake and eat it too. It will either have to come up with a more workable solution or return to considering individual station performance in isolation (which public interest groups would prefer) or accepting totally the marketplace theory and remove all regulation of individual stations (which stations would probably favor). The final option would require substantial changes in the Communication Act.

In conclusion, the FCC's argument that marketplace forces could help determine what constitutes the public interest was a substantial departure from previous attempts at determining public interest. Earlier attempts were based on the assumption that because of the lack of competition, the marketplace could not regulate itself. The Commission stated rather strong support for marketplace theory in the Notice but retreated significantly from that position in the Report. It concluded that the marketplace can probably regulate itself most effectively in the areas of commercial limits and total amounts of non-entertainment programming, especially news programming. The marketplace is less likely to stimulate public affairs programming. The Commission failed to demonstrate that market forces can be depended upon to do an adequate job of ascertaining community needs. It admitted that government regulation, not market self-regulation, was needed to assure general obligations to ascertain community needs and to provide non-entertainment programming. Finally, it failed to provide a workable mechanism whereby

failures in the marketplace could be assessed and corrected. The final solution -- individual station accountability within a market framework -- is clearly unacceptable to both broadcasters and the public. The marketplace is an imperfect mechanism, but the FCC argued that it was preferable in some instances over government regulation.

Footnotes

- ¹ 46 FR 13888, 13889.
- ² Id at 13890.
- ³ Frederick W. Ford, "The Meaning of the Public Interest, Convenience or Necessity:" 5 Journal of Broadcasting 205,208.
- ⁴ Proceeding of the 4th Radio Conference. Washington, D.C.: U.S. Government Printing Office, 1926, pp. 7-8.
- ⁵ 67 Congr. Rec. 5483, 5484.
- ⁶ 2 FRC Ann. Rep 166 (1928).
- ⁷ Id at 167.
- ⁸ Id.
- ⁹ 289 U.S. 266, 285.
- ¹⁰ FCC v. Pottsville 309 U.S. 134, 138.
- ¹¹ Ford, p. 205.
- ¹² Dean M. Krugman and Leonard N. Reid, "The 'Public Interest' as defined by FCC Policy Makers," 24 Journal of Broadcasting 311, 320 (1980).
- ¹³ 2 FRC Ann. Rep 166, 167.
- ¹⁴ Id.
- ¹⁵ 68 Cong. Rec 3030.
- ¹⁶ 2 FRC Ann. Rep. 166, 167-170.
- ¹⁷ Id at 170.
- ¹⁸ 3 FRC Ann. Rep. 32, 34.
- ¹⁹ 309 U.S. 470, 475 (1940).
- ²⁰ 37 RR 2d 1679, 1684 (1976).
- ²¹ 49 RR 2d 271 (1981).
- ²² Editorializing by Broadcast Licensees, 13 FCC 1246 (1946).
Commission en banc Programming Inquiry, 44 FCC 2303 (1960).
- ²³ Trinity Methodist Church, South v. FRC, 62 F. 2d 850 (1932).

- 24 National Broadcasting Co. v. U.S. 319 U.S. 190 (1943).
- 25 20 RR 1901, 1906 (1960).
- 26 25 RR 1901, 1904 (1949).
- 27 16 RR 2d 2029, 2047 (1969).
- 28 Title 18 U.S.C. Sec. 1304.
- 29 Title 18 U.S.C. Sec. 1464.
- 30 Title 18 U.S.C. Sec. 1343.
- 31 78 U.S. Statutes at Large 241 Public Law 88-352.
- 32 16 RR 2d 1904 (1949).
- 33 25 RR 1901, 1904 (1949).
- 34 Id at 1905.
- 35 44 FR 57635.
- 36 46 FR 13888.
- 37 46 FR 13883, 13892. Comments of the United States Department of Justice,
p. 4.
- 38 46 FR 13888, 13893. Comments of Jennings Broadcasting Company.
- 39 Petition of Henry Geller for Reconsideration of Radio Deregulation Action,
National Association of Broadcasters Petition for Partial Reconsideration,
Petition for Reconsideration of Citizens Communication Center, et al.,
and Petition of the National Black Media Coalition for Reconsideration,
Clarification, and Stay.
- 40 Classical Radio for Connecticut Petition for Review of the Commission's
Report and Order before the U.S. Court of Appeals in Washington.
- 41 44 FR 57635, 57646-57662.
- 42 Id at 57662.
- 43 Id at 57665.
- 44 Id.
- 45 Id.
- 46 Id. at 57664.

- 47 Id. at 57667.
- 48 Comments of Dr. Dallas W. Smythe for the Office of Communication of the United Church of Christ.
- 49 46 FR 13888, 13912.
- 50 Smythe comments at pp. 29-32.
- 51 46 FR 13888, 13912.
- 52 Comments of the WNCN Listeners Guild, the Office of Communications of the United Church of Christ, and others.
- 53 46 FR 13888, 13913.
- 54 Id. at 13915.
- 55 Comments of the ACLU et al at pp. 21-22 and Comments of Massachusetts National Organization of Women at p. 4.
- 56 46 FR 13888, 13913.
- 57 Id. at 13914.
- 58 Id. at 13938.
- 59 Comments filed by NAB, ACLU and others.
- 60 46 FR 13888, 13930.
- 61 Id. at 13890 - 13893, 13917.
- 62 Henry v. FCC 302 F. 2d 191, 193-194 (D.C. Cir. 1962).
- 63 46 FR 13888, 13947.
- 64 Id. at 13913.
- 65 Id.
- 66 Id. at 13914.
- 67 Id. at 13930.
- 68 Id.
- 69 Id.
- 70 Id. at 13925, 44 FR 57635, 57657 - 57658.

- 71 Id. at 57657.
72 Id. at 57658.
73 46 FR 13888, 13925.
74 Id. at 13894.
75 44 FR 57635, 57659.
76 Id. at 57647 - 57648.
77 Id. at 57660 - 57661.
78 46 FR 13888, 13905.
79 Id. at 13896.
80 Id. at 13897.
81 Id. at 13896.
82 Id. at 13930.
83 Id. at 13897.
84 Id.